Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-627 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
13 MAY 2002

Civil Procedure *— Appeal — Costs — Application by appellant to the Court of Appeal for a stay pending appeal — Whether appellant had to pay costs for an application for a stay pending appeal — Whether there was requirement that a separate application to the High Court be made before applying to the Court of Appeal for a stay pending appeal — Courts of Judicature Act 1964 ss 43, 44 and 73, Federal Constitution art 121(1B)*

Civil Procedure *— Appeal — Stay of execution — Moneys paid into court ordered to be paid out to respondent — Appellants applied for a stay — High Court judge requested a written application and refused to allow an interim stay in the meantime — Appellant applied to the Court of Appeal for a stay pending appeal — Whether there was a requirement that a separate application to the High Court be made before applying to the Court of Appeal for a stay pending appeal — Court of Judicature Act 1964 ss 43, 44 and 73, Federal Constitution art 121(1B)*

The respondent had paid moneys into court and after the conclusion of the trial, the respondent applied for payment out. This was allowed by the judge. The appellant immediately asked for a stay because it wanted to take the matter further. The judge asked for a written application to be made. The appellant said that it would do so, but requested for an interim stay in the meantime in case the moneys were released pending the making or the hearing of that application. The judge refused the request. The appellant then appealed against the refusal of the interim stay and applied to the Court of Appeal for a stay pending appeal. The appeal was allowed and an interim stay was granted. All relevant proceedings had since been withdrawn and the only question to be determined was whether the appellant had to pay costs. Counsel for the respondent argued that it was entitled to all costs incurred with regard to the stay proceedings before the Court of Appeal because the order refusing the interim stay was not appealable and hence the Court of Appeal had no jurisdiction to deal with the matter in the first place. He contended that the only avenue available to the appellant was to appeal against the order directing the release of the monies from court and to move the Court of Appeal for a stay in those proceedings.

Held:

(1) Section 44 of the Courts of Judicature Act 1964 ('the Act') empowered the Court of Appeal to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself. Unlike s 73 of the Act, s 44 did not confer concurrent jurisdiction on the High Court and the Court of Appeal but conferred original jurisdiction on the

Court of Appeal. Hence, s 43 of the Act did not apply and there was no requirement that a separate application to the High Court be made before a litigant may invoke the s 44 jurisdiction of the Court of Appeal. Hence, it was not necessary that the appellant make a separate application to the High Court before approaching the Court of Appeal for an application for stay pending appeal (see p 120B–D). A B

(2) The facts here were exceptional because the High Court judge had already ordered the moneys to be paid out and then directed the making of a written application for a stay. This written application would have been rendered academic if, pending the making or the hearing of that application, the moneys were released. As such, the appellant requested for an interim stay. When that was refused as well, the appellant found that it was unable to apply to the Court of Appeal for a stay within the substantive appeal because the High Court had not refused a stay. The High Court merely required a written application. It was to meet this deadlock that the appellant lodged the present appeal against the refusal of the interim stay and made the application to the Court of Appeal for a stay pending the appeal. The appellant had to take the course it did due to the manner in which the matter had developed before the High Court and none of it was of the appellant's making. Hence, the appellant should not be required to pay costs (see pp 121C–F); *Shanmugam Pillai v Panjali* [1961] MLJ 290 and *Cropper v Smith* (1883) 24 Ch D 305 distinguished. C D E

[Bahasa Malaysia summary F

Responden telah membayar wang ke dalam mahkamah dan selepas penutup perbicaraan, responden memohon bayaran keluar. Ini dibenarkan oleh hakim. Perayu terus memohon penggantungan kerana ia ingin meneruskan tindakan. Hakim meminta permohonan bertulis dibuat. Perayu berkata ia akan berbuat demikian, tetapi meminta penggantungan interim jikalau wang tersebut dilepaskan sementara menunggu pembuatan atau pembicaraan permohonan itu. Hakim menolak permintaan tersebut. Perayu kemudian merayu terhadap penolakan penggantungan interim dan memohon kepada Mahkamah Rayuan untuk penggantungan sementara menunggu penyelesaian rayuan. Rayuan dibenarkan dan satu penggantungan interim diberikan. Semua prosiding relevan telah ditarik balik sejak itu dan satu-satunya soalan yang harus diputuskan adalah sama ada perayu harus membayar kos. Peguam bagi pihak responden berhujah bahawa ia berhak mendapat semua kos yang dikenakan dalam prosiding penggantungan di hadapan Mahkamah Rayuan kerana perintah yang menolak penggantungan interim tidak boleh dirayu dan justeru itu Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mengurus perkara ini. Beliau berhujah bahawa satu-satunya cara yang G H I

terbuka kepada perayu adalah untuk merayu terhadap perintah yang mengarah supaya wang tersebut dilepaskan dari mahkamah dan untuk memohon Mahkamah Rayuan untuk penggantungan prosiding itu.

Diputuskan:

(1) Seksyen 44 Akta Mahkamah Kehakiman 1964 ('Akta tersebut') tersebut memberi kuasa kepada Mahkamah Rayuan untuk membuat perintah bagi mengekalkan kemuliaan suatu rayuan atau prosiding lain, termasuk permohonan di bawah seksyen itu sendiri. Berbeza dengan s 73 Akta tersebut, s 44 tidak memberikan bidang kuasa serentak ke atas Mahkamah Tinggi dan Mahkamah Rayuan tetapi memberikan bidang kuasa asli kepada Mahkamah Rayuan. Maka, s 43 Akta tersebut tidak terpakai dan tidak perlu bagi satu permohonan berasingan kepada Mahkamah Tinggi dibuat sebelum pihak litigan boleh menggunakan bidang kuasa Mahkamah Rayuan di bawah s 44. Justeru itu, perayu tidak perlu membuat permohonan berasingan kepada Mahkamah Tinggi sebelum mendekati Mahkamah Rayuan untuk permohonan penggantungan sementara menunggu penyelesaian rayuan (lihat ms 120B–D).

(2) Fakta-fakta di sini luar biasa kerana hakim Mahkamah Tinggi telahpun memerintahkan supaya wang dibayar keluar dan kemudian mengarahkan supaya satu permohonan secara bertulis untuk penggantungan dibuat. Permohonan bertulis ini sudah tentu menjadi akademik andainya, sementara menunggu pembuatan atau pembicaraan permohonan itu, wang tersebut dilepaskan. Oleh itu, perayu meminta penggantungan interim. Apabila ini juga ditolak, perayu mendapati bahawa ia tidak dapat memohon kepada Mahkamah Rayuan untuk penggantungan dalam lingkungan rayuan substantif kerana Mahkamah Tinggi tidak menolak permohonan penggantungan. Mahkamah Tinggi cuma menghendaki permohonan bertulis. Dengan tujuan menyelesaikan jalan buntu inilah perayu mengemukakan rayuan ini terhadap penolakan penggantungan interim dan membuat permohonan kepada Mahkamah Rayuan untuk penggantungan sementara menunggu penyelesaian rayuan. Perayu terpaksa mengambil jalan yang dipilihnya disebabkan cara mana perkara itu telah berkembang di hadapan Mahkamah Tinggi dan ia bukanlah kesalahan perayu. Justeru itu, perayu tidak patut dikehendaki membayar kos (lihat ms 121C–F).]

Notes

For cases on costs, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 654.

For cases on stay of execution, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1213–1219.

Cases referred to

Annamalai Chettiar v Yeoh Kee Tin [1956] MLJ 49 (refd)
Cropper v Smith (1883) 24 Ch D 305 (distd)
Jurutera Consultant (SEA) Sdn Bhd & Ors v Eddie Lee Kim Tak & Ors [1999] 1 MLJ 38 (refd)
Penang Port Commission lwn Kanawagi a/l Seperumaniam [1997] 2 MLJ 300 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Shanmugam Pillai v Panjali [1961] MLJ 290 (distd)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 43, 44, (2), 67, (1), 68(2), 73
Courts Ordinance 1948
Federal Constitution art 121(1B)
Judicature Acts 1873–1875 [UK] s 19
Rules of Court 1875 [UK] O 58 r 16

Appeal from: Civil Appeal No S2(S1)22–09–1998 (High Court, Kuala Lumpur)

VK Lingam (*R Thayalan* and *VK Lashmi* with him) (*VK Lingam & Co*) for the appellant.

KS Narayanan (*Joginder Singh*, *CT Annathural*, *C Sabapathy*, *A Vishu Kumar* and *Tharminder Singh* with him) (*Logan Sabapathy & Co*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This is the judgment of the court.

This appeal raises a short point of procedure. Counsel for the respondent says that it is a point of much importance. With respect, my learned brothers and I do not agree. It is, we think, hardly likely to recur in the future.

The factual matrix against which the point arises need not be gone into in much detail.

There were monies in court that had been paid in by the respondent. After the trial was over, the respondent applied for payment out. The judge allowed that. The appellant at once asked for a stay because it wanted to take the matter further. The judge asked for a written application to be made. The appellant said that it would do so, but requested an interim stay in the meantime. The judge refused the request. The appellant then appealed against the refusal of the interim stay and applied to this court for a stay pending appeal. That application went before the late Wan Adnan Ismail PCA. His lordship granted an interim stay, which was later extended by this court. All relevant proceedings before us in this regard have since

A been withdrawn and the only question that remains for disposal is one of costs.

Counsel for the respondent has argued that it is entitled to all costs incurred with regard to the stay proceedings before this court because the order refusing the interim stay was non-appealable so that this court had no B jurisdiction to deal with the matter in the first place. It is therefore contended that the only avenue available to the appellant was to appeal against the order directing the release of the monies from court and to move this court for a stay in those proceedings. Several authorities were cited to us in support of this argument. It is necessary to discuss only two of them.

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In *Cropper v Smith* (1883) 24 Ch D 305, the defendants in a patent action applied to the High Court to stay proceedings under the judgment entered against them. Chitty J refused that application and after the time limited to appeal against that order had expired, the defendants moved the Court of Appeal for a stay. Although that application was dismissed on its D merits, a preliminary question arose as to whether the appellant's motion was an appeal or an application. This was because appeals to the Court of Appeal in England are brought by notice of motion and not as here, by way of a notice of appeal. Had it been an appeal, it would have been out of time. The court interpreted the motion before it and came to the conclusion that it was not an appeal against Chitty J's order. It held that O 58 r 16 of the E Rules of Court 1875 ('1875 Rules') conferred concurrent jurisdiction upon the High Court and the Court of Appeal to entertain an application for a stay. Rule 16 of the 1875 Rules is similar to s 73 of our Courts of Judicature Act 1964. In essence, both provide that an appeal is not to operate as a stay of execution unless the High Court or the Court of Appeal may so order. It was in this context that Brett MR, after referring to O 58 r 16, said this at F pp 308–309:

> By that rule it is assumed that the Court of Appeal has jurisdiction, and to my mind, according to the true reading of that rule, *not a jurisdiction by way of appeal merely*, but an independent jurisdiction, and if that rule had remained alone it would have been obvious to my mind that the application might have G been made either to the court appealed from or to the Court of Appeal. Then the 17th rule says that, 'Wherever under these rules an application may be made either to the court below or to the Court of Appeal' (which in terms assumes that but for what is going to be said immediately afterwards it might be made either to the court below or to the Court of Appeal) 'it shall be made in the first instance to the court or judge below'. That imposes a limitation on H the action of the Court of Appeal, but a limitation not affecting its jurisdiction, and does not at all shew that the motion in the Court of Appeal is an appeal. On the contrary, the 17th rule seems to me to first assume, as the 16th rule did, that it is not an appeal, that there is an alternative jurisdiction, and alternative jurisdiction is of course co-ordinate. Then in order that the Court of Appeal and the court below may not incur the risk of deciding in different I ways as to staying proceedings without either of them knowing of the application to the other, the rule imposes this limitation, that although the jurisdiction is co-ordinate, and although it is alternative, yet the Court of Appeal will not exercise its jurisdiction until it knows whether the co-ordinate

jurisdiction of the Divisional Court has been exercised and how. That seems to me to be the true reading of the 17th rule. (Emphasis added.)

In *Shanmugam Pillai v Panjali* [1961] MLJ 290, the Sessions Court at Seremban, having made an order for possession in the landlord's favour, refused a stay. The tenant appealed to the High Court against the order refusing the stay. Ismail Khan J held the procedure adopted to be an illegality and dismissed the appeal. He said at p 291:

> Mr George for the respondent raised the preliminary objection that the step taken by the appellant in appealing against the refusal of the stay of execution is not warranted by any rule of procedure. He referred to O 59 r 12 which reads as follows:
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> > 'An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the court appealed from.'
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> The court below and the High Court have therefore a co-ordinate jurisdiction to entertain an application for a stay of execution but as regards the High Court, while it has an independent jurisdiction to stay proceedings, pending an appeal, it is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the court below. The reason for this is that the High Court and the court below may not, to use the words of Brett MR in the case of *Cropper v Smith* (1883) 24 Ch D 305, at p 308, 'incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other'. It is clear that on the refusal by the learned President of the application for a stay of execution, the only other course open to the appellant would have been to apply to this court in its original jurisdiction for a stay. Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that object, as it has been done in this case by appealing against the refusal for a stay of execution by the court below, is a curable irregularity. I have no power to convert an appeal into an application. I am reminded of Lord Herschell's judgment in *Smurthwaite v Hannay* [1894] AC 494, at p 501 where his Lordship in speaking of a joinder of plaintiffs which is not authorized by the rules of procedure observed: 'If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity'. In fact, in my opinion, the step taken by the appellant by way of an appeal is an illegality and I may say at once that O 70 r 1 has no application.

Before expressing any view on the relevance of these cases to the present instance, it is necessary to hearken to some of the relevant statutory provisions. First, there is s 67(1) of the Courts of Judicature Act 1964 ('the Act'). It says that this court has jurisdiction to hear and determine appeals 'from any judgment or order of any High Court'. It is a very wide provision. There are limitations imposed by s 68(2). But they are not relevant for present purposes. Section 67(1) itself contains a restriction. It will be dealt with in the appropriate place in this judgment.

My learned brothers and I are of the view that the words 'any judgment or order of any High Court' in s 67(1) should be read liberally. That is the

A way in which they were read by this court in *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696. If we accept Mr Narayanan's argument, it would cut down the full effect of the section. It will limit the clear words of the section. We should not do that.

There is constitutional reinforcement for the view we take. Article
B 121(1B) of the Federal Constitution after creating the Court of Appeal confers jurisdiction 'to determine appeals from the decisions of a High Court or a judge thereof' but not from a decision of the registrar of the High Court. The article goes on to say in effect that federal law may confer other jurisdictions. So, if we read s 67(1) together with art 121(1B), we can see at once that no limitation may be placed upon the appellate jurisdiction of this
C court.

We now turn to the words of restriction appearing in s 67(1). They say that the jurisdiction is 'subject nevertheless to this or any other written law *regulating the terms and conditions* upon which such appeals shall be brought'. The critical words are those to which we have lent emphasis. Now, what do
D those words mean? In our judgment, they mean that the Act or some other written law, such as the Rules of the Court of Appeal, may only regulate the way in which the appeals may be brought. For example the Act or other written law may stipulate that appeals in particular cases require leave; or that a deposit of a fixed sum must be paid as security for costs when the notice of appeal is filed.

E We will now address two other provisions of the Act, namely, ss 73 and 43. The former confers concurrent jurisdiction on the High Court and this court to grant a stay of execution. The latter says that where an application may be made to the High Court or to this court, it must be made to the High Court in the first place. So, if an order is made to the prejudice of a litigant and a stay of that order is necessitated, then it is the High Court that must
F be moved for such a stay first before this court is approached. If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until s 43 is complied with. In our view, this is plain upon a joint reading of ss 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in *Annamalai Chettiar v Yeoh Kee Tin* [1956] MLJ
G 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on the ground that the High Court had not first been moved. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been
H moved is, in our view, the proper order to make.

We must now address s 44 of the Act. It is an important provision. For that reason we will reproduce it.

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any
I interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal. A

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

Now, it is significant that the section is markedly different from s 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. By contrast, s 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself (see sub-s (2)). Such interim preservation orders may take the form of an injunction or other relief designed — in the words of the section — 'to prevent prejudice to the claims of parties'. Further, s 44, unlike s 73, does not confer concurrent jurisdiction on the High Court and this court. It confers original jurisdiction on this court. Hence, s 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s 44 jurisdiction of this court. In other words, s 44 is not to be read as being subject to s 43. B C D

However, this court has on several occasions treated s 44 as governing applications for a stay of execution (see *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598; *Penang Port Commission lwn Kanawagi a/l Seperumaniam* [1997] 2 MLJ 300; *Jurutera Consultant (SEA) Sdn Bhd & Ors v Eddie Lee Kim Tak & Ors* [1999] 1 MLJ 381). Having carefully considered the relevant statutory provisions, my learned brothers and I have come to the conclusion that this is an unnecessarily restrictive view of s 44 in the absence of any express or implied limitation imposed by the language employed by Parliament. Further, it is most unlikely that Parliament would have enacted two provisions governing the stay of execution. And if Parliament intended the s 44 jurisdiction to be concurrently exercisable by this court and the High Court, it would have said so. Accordingly, it is our view that an application to this court under s 44 which is not in the nature of an application for a stay of execution may be made without the necessity of complying with s 43 of the Act. E F

That brings us to the cases referred to earlier in this judgment. In our view, these are readily distinguishable. *Cropper v Smith* was decided after the passing of the Judicature Acts 1873–75. Section 19 of the 1873 Act provided as follows: G

> The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act. For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice. H I

A This section, though similar to our s 67, is differently constructed in that the bringing of appeals is made expressly subject to rules of court. Further, the jurisdiction of the English Court of Appeal is dependant merely on statute whereas our jurisdiction is founded upon the terms of the Federal Constitution which declares itself as the supreme law of this country.

B So far as *Shanmugam Pillai v Panjali* is concerned, that was an appeal from a subordinate court to the High Court. Such appeals were governed (under the Courts Ordinance 1948) and continue to be governed (under the Act) by provisions entirely different from s 67.

That brings us to the facts of the present case.

C We think that the circumstances here were really most exceptional. We will recount them. The judge had already ordered the monies to be paid out and then directed the making of a written application for a stay. In the meantime, the appellant was left without any protection. Any written application would have been rendered academic if, pending the making or the hearing of that application, the monies were released. Hence the request D for an interim stay. When that was refused as well, the appellant found itself in an invidious position.

It was unable to apply to this court for a stay within the substantive appeal because the High Court had not refused a stay: all it had done was to simply require a written application. It is to meet this deadlock that the E appellant lodged the present appeal and made the application we spoke of earlier. That it seems to us to have been driven entirely by the way in which the matter developed before the High Court. None of it was of the appellant's making.

This is therefore a case where the appellant in the exercise of its F undoubted right of appeal conferred by the Act came before this court. We can hardly punish it in costs for this.

One final point. We would observe that all the several proceedings before us in the present case would have been unnecessary if the High Court had heard and decided on whether to grant a stay pending the appeal instead of requiring a formal written application being made. In that event, G the matter could have been brought before this court and dealt with in the usual way. The grant by the High Court of a stay pending appeal is not an admission by that court that it had erred in making the order that is the subject matter of the appeal. Neither is it inconsistent with the decision that is proposed to be appealed. For this reason, the High Court should be H flexible in the exercise of its discretion when deciding whether to grant a stay. This would considerably reduce the large volume of urgent stay applications that are constantly made to this court.

Order accordingly.

I Reported by Lim Lee Na